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No. 86-1548

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION IN OPPOSITION

EUGENE B. GRANOF*
AIR LINE PILOTS ASSOCIATION
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4079
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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Pursuant to Supreme Court Rule 22.6, Respondent Air Line Pilots Association, International ("ALPA") submits this supplemental brief in opposition to the petition for certiorari filed by Northwest Airlines, Inc. Since ALPA's last filing, the Court decided *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 108 S. Ct. 364 (1987), and, more recently, dismissed as improvidently granted the writ of certiorari in *U.S. Postal Service v. Nat'l Assn. of Letter Carriers,* 56 U.S.L.W. 4362 (U.S. April 27, 1988).

1. In *Misco* the Court stated (108 S. Ct. at 374):

> Had the arbitrator found that Cooper had possessed drugs on the property, yet imposed dis-

> cipline short of discharge because he found as a factual matter that Cooper could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.[11]
>
> [11] The issue of safety in the workplace is a commonplace issue for arbitrators to consider in discharge cases, and it was a matter for the arbitrator in the first instance to decide whether Cooper's alleged use of drugs on the job would actually pose a danger. That is not a problem here, for the arbitrator recognized that being under the influence of marijuana while operating slitter-rewinder machinery was indeed dangerous, and no one disputed this point.

In the instant case, the parties stipulated in the System Board proceeding that First Officer Larry Morrison performed his duties as a commerical pilot while under the influence of alcohol (Pet. App. 54a), and no one disputed the danger of such misconduct. Nonetheless, the Board imposed discipline short of discharge because it found as a factual matter that he could be trusted to return to flying without endangering air safety. Specifically, the Board determined that Mr. Morrison was an alcoholic who had successfully rehabilitated himself and remained abstinent. (Pet. App. 72a) Even then, the Board conditioned Mr. Morrison's reinstatement on his obtaining an unrestricted first class medical certificate from the Federal Aviation Administration, which requires " 'established clinical evidence, satisfactory to the Federal Air Surgeon, of recovery, including sustained total abstinence from alcohol, for not less than the preceding 2 years.' " (Pet App. 73a) In these circumstances, as *Misco* makes clear, the court of appeals correctly concluded that "there is no [public policy] basis upon which to set aside the Board's award in this case." (Pet. App. 13a)

2. The Court noted in *Misco* (108 S. Ct. at 374-75, n. 12) that "[w]e need not address the Union's position that a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law."[1] However, as with *U.S. Postal Service v. Natl. Assn. of Letter Carriers, supra,* this case is not a suitable vehicle for addressing the issue deliberately left unaddressed in *Misco.* Our case is atypical in that, as the court of appeals pointed out, "the Board's award was conditioned upon a finding by the FAA—*i.e.*, the authorized public agency responsible for licensing pilots—that Morrison was fit and qualified to fly." (Pet. App. 13a) Hence, ". . .it would be patently absurd. . ., under the guise of 'public policy,' to reverse an arbitration award that is expressly limited by deference to the ultimate judgment of the agency that is charged with the enforcement of the public policy here at issue." *Ibid.*

CONCLUSION

The decision in *Misco* and the dismissal of the writ of certiorari in *Letter Carriers* provide a sound additional basis for denying the petition for certiorari here.

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[1] The Union's position in *Misco* is likewise the view of the District of Columbia Circuit in this case (Pet. App. 12a-13a) and in others. *E.g., American Postal Workers Union v. United States Postal Service,* 789 F.2d 1, 8 (D.C. Cir. 1986). Indeed, Judge Harry T. Edwards, the author of the court of appeals' decisions in this case and in *American Postal Workers,* has also authored a post-*Misco* law review article forcefully and persuasively supporting that view. Edwards, *Judicial Review Of Labor Arbitration Awards: The Clash Between The Public Policy Exception And The Duty To Bargain,* 64 Chi.-Kent L. Rev. 3 (1988).

Respectfully submitted

EUGENE B. GRANOF*
AIR LINE PILOTS ASSOCIATION,
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4079
Counsel for Air Line Pilots Assn.

**Counsel of Record*

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